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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JORGE ALBERTO INNOCENCIO,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED FOR REVIEW

1. Since the district court found petitioner **read the consent form**, both courts below clearly erred in their factual determination that since petitioner **never read that consent form**, he could not have relied on its mistaken translation.

2. The courts below erred in **shifting to petitioner** the burden to prove involuntary was the alleged oral consent.

3. The courts below erred in **lessening** the government's burden of proving the fact of alleged oral consent.

4. With officers' relying only on an invalidly translated written consent to search, the courts below erred in upholding the search's validity based on an alleged **contemporaneous** oral consent.

PARTIES BELOW

At the appeals and district courts, all the parties were: Jorge Alberto Innocencio (**or** Inocencio), Pedro Elizondo Garza, Homero Hinojosa Garcia, Oziel Alanis, David Tovar and the United States of America.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner Jorge Alberto Innocencio, Jr., prays a writ of certiorari issue to review the judgment and opinion below.

OPINIONS BELOW

The unpublished opinion of the U. S. court of appeals appears at pages 1 to 15 of this petition's appendix (Pet.App. 1-15). For the judgment of the U.S. district court, see Pet.App. 18-29. For the district court's findings of facts and conclusions of law, see Pet.App. 30-54.

BASIS FOR SUPREME COURT'S JURISDICTION

On July 16, 1997, the court of appeals entered its judgment and opinion in the direct appeal of this criminal case. On August 13, 1997, the court of appeals denied a timely petition for panel rehearing (Pet.App. 16 [after 16, see faxed copy]. Petitioner sought no extension of time to file this petition.

Undersigned counsel was not involved in this case at the court of appeals and only learned by phone conversation with a deputy clerk at the court of appeals **on November 14, 1997**, that the court of appeals denied the rehearing motion on August 13, 1997. Previously undersigned counsel only had a copy of the mandate issued by the court of appeals in this case on August 22, 1997, and was working on the incorrect assumption this petition for certiorari was due to be filed on **November 20, 1997**, which is the 90th day after August 22, 1997. Then on **November 19, 1997**, undersigned first received from the deputy clerk a faxed copy of the court of appeals order denying the petition for rehearing on August 13, 1997 (Pet.App. 16).

Petitioner believes 28 U.S.C. 1254(1) confers on this Court jurisdiction to review on a writ of certiorari the judgment in question.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Jurisdiction in the U.S. district court was conferred under 18 U.S.C. 3231.

On February 22, 1995, a grand jury Indicted Innocencio in the Houston division of the southern district of Texas. On August 17, 1995, a jury found Innocencio guilty of the offenses charged in counts one, two and four of the indictment. **Count one** alleged Innocencio and others knowingly and intentionally conspired, confederated and agreed with others known and unknown to commit the following offense against the U.S., to wit: to possess with intent to distribute in excess of five kilograms of cocaine, a Schedule II controlled substance in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 21 U.S.C. 846. **Count two** alleged Innocencio and others aided and abetted persons known and unknown to knowingly and intentionally possess with intent to distribute in excess of five kilograms of cocaine, a Schedule II controlled substance in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 18 U.S.C. 2. **Count four** alleged Innocencio and others intentionally combined, conspired, confederated and agreed with each other and with

other persons known and unknown to commit the following offense against the U.S. in violation of 18 U.S.C. 1956, to wit: to knowingly and willfully attempt to conduct, conduct, and cause to be conducted a financial transaction, the activities of which affect interstate and foreign commerce with the proceeds of a specified unlawful activity, that is, drug trafficking, with the intent to promote the carrying on of said specified unlawful activity and knowing that the funds represented the proceeds of some form of unlawful activity, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and 1956(g).

On July 18, 1995, the district court entered findings of fact and conclusions of law [FFCL] on the suppression motions of this case's five defendants (Pet.App. 31-54).

On December 15, 1995, the district court sentenced Innocencio to concurrent 365 month-terms of imprisonment under counts one and two, and an additional concurrent 240 month-term of imprisonment under count four. The district court also sentenced Innocencio to a special assessment of $150.00 and terms of supervised release both of five years as to counts one and two and of three years on count 4.

It was the government's contention, throughout the course of the case in its documents filed in the trial court in this cause, that Innocencio **read** the consent form. (Record on Appeal Tab 80, U.S. Supplemental Response to Motion to Suppress, p. 9; Record on Appeal Tab 91, Govt's Proposed Findings of Fact and Conclusions of Law, p. 9; Record on Appeal Tab 97, Govt's Amended Proposed Findings of Fact and Conclusions of Law, p. 9; and Record on Appeal Tab 114, Govt's Trial Memorandum, p. 9).

The record supports Innocencio's contention that he understood Officer Bell orally requesting permission to question him. Officer Bell, from the beginning, **informed Innocencio he wanted to question him**.

Q What happened next?

A I explained to Mr. Inocencio that we were conducting an investigation, and I asked if he would perhaps help us or give us some answers to the investigation that we had.

Q Did you tell him what kind of investigation you were conducting?

A I told him it was a narcotics investigation. I asked if we could go inside his house where he could continue the investigation inside, and he said yes. (Suppress Hearing 1R 137, line 21 -- 137, line 4)

Q Okay. What happened at the dining room table?

A At the dining room table, I talked to Mr. Inocencio and I told him that we were conducting an investigation involving a black Camaro which we had seen at a hotel, at the Days Inn earlier in the day. And I asked him if he knew anyone who drove a black Camaro or who was staying at the Days Inn that he might be able to help us with that investigation. (Suppress Hearing 1R 137, lines 10-17)

Innocencio often testified he understood Officer Bell's requesting **consent to question** him inside the house on the investigation, without **consent to search** the house.

Q After you felt you were arrested by this officer, did you have an occasion to speak with an officer who testified the last time we were here, on friday? Officer Ted Bell?

A Yes, sir.

Q Was that conversation in English or in Spanish?

A In Spanish.

Q Did you understand the conversations you were having with him?

A Yes. He told me that he was going to ask me some questions. (Suppress Hearing 2R 11, lines 1-10)

Q During this questioning by officer bell, did he at any time request for your permission to search your house?

A No, sir.

Q Did you ever understand him to want to search your house?

A No, sir.

Q Did you understand everything he was telling you?

A Well, some of the things.

Q What do you mean, some of the things?

A Well, because he doesn't speak very good English.

Q English?

A I mean Spanish. (Suppress Hearing 2R 12, lines 20 -- 13)

Q Now when you signed this instrument, did you think you were giving consent to search your house?

A No, sir.

Q What is it that you thought you were acquiescing to?

A Only that they were investigating my person, asking me questions. (Suppress Hearing 2R 14, lines 25 -- 15, line 5)

Q Okay. And what did you understand was going to happen to you when you signed this document?

A Well, they was only to ask me questions.

Q And how did you determine that?

A Because there where--my name is right above. It says "person," and that's what I understood.

Q Is that what officer bell had told you, that you were going to be questioned if you signed it?

A Yes, Sir. (Suppress Hearing 2R 15, line 22 -- 16, line 5)

THE COURT: What is the word you would use for "search".

THE WITNESS: Catear.

THE COURT: How do you spell it?

THE INTERPRETER: C-A-T-E-A-R.

THE COURT: Okay. Go on.

BY MR. PEREZ:

Q Were those words ever used by Officer Ted Bell?

A No, sir. (Suppress Hearing 2R 17, lines 10-19)

Q And up until that point, you and he were communicating pretty well in Spanish, right?

A Yes, we were having a conversation in Spanish.

Q You understood what he told you, and you felt that he understood what you were telling him, right?

A Well, many words I did not understand. (Suppress Hearing 2R 28, lines 19-24)

Q Sir, isn't it true that the whole gist of you and Officer Bell's conversation in the driveway and inside your house, before the cocaine was found, was whether Officer Bell could search your house?

A No. He never told me that he wanted to search the house.

Q You are telling the Court, under oath here, from the time you arrived at the driveway to the time the cocaine was found in your house, that he never discussed him or other law enforcement personnel your house?

A No, sir.

Q Never? That never came up?

A No, sir.

THE COURT: Okay. That what he says.

BY MR. R. PEREZ:

Q Did he ask you for your permission to search your logic?

A I never understood that he wanted to make a search. (Suppress Hearing 2R 35, lines 6-21)

THE COURT: Did the officer ever ask you at any time permission to search your house, ever?

THE WITNESS: No, sir.

THE COURT: Did you understand that, by signing that document, you would be giving permission to search the house?

THE WITNESS: No, sir. (Suppress Hearing 2R 37, lines 13-18)

The trial court concluded in its findings of facts that Innocencio **read** and signed a written consent form to search his residence located at 5816 Mavis Lane, Pasadena, Texas. (Pet.App. 37 at pgh. 23; and 43 at pgh. 44). However, in its legal conclusions the trial court concluded that Innocencio **did not read** the consent form and for that reason the written form did not invalidate the consent. (Pet.App. 52 at pgh. 33). The trial court's legal conclusion is in conflict with its finding of fact and with the evidence as hereinbelow noted, and this is an incorrect view of law predicated on the court's mistake and illogical conclusion. Viewing the evidence in the light most favorable **to the over all picture from the fact finder**, the court of appeals rejected that trial court's findings that Innocencio read the form.

The trial court's findings of fact that Innocencio **read** and signed a written consent form is amply supported by the evidence. Innocencio testified on direct that he read at least parts of the form and that he signed it:

Q Did you read this document?

A No, sir.

Q Did you read any parts of the document?

THE COURT: Excuse me. He said no. He said he didn't read the document.

BY MR. R. PEREZ:

Q Well, you have your initials on this part (indicating)?

A Yes, sir.

Q Do you know why you put your initials there?

A Because the officer made a mistake. He wrote "Houston" instead of "Pasadena".

Q Did you see this place where your name was, Jorge Alberto Inocencio, and you driver's license?

A Yes, sir.

Q Did you read that?

A Well, I saw my name there.

Q Okay, and what did you understand was going to happen to you when you signed this document?

A Well, they was only to ask me questions.

Q And how did you determine that?

A Because there where--my name is right above. It says "person," and that's what I understood.

Q Is that what Officer Bell had told you, that you were going to be questioned if you signed it?

A Yes, sir.

Q Have you ever heard the English word `premises'? The English word.

A No, sir.

Q Have you ever heard the Spanish word premisas, P-R-E-M-I-S-A-S?

A No, sir.

Q Well, are you saying to us that you don't know the meaning of either word, sir?

A No, sir.

Q Do you know the meaning of either word?

A No, sir. I don't know the meaning. (Suppress Hearing 2R 15, line 6 -- 16, line 16)

The trial court concluded that Innocencio did not read the form based on his answer, that he had not read the (whole) form. Innocencio's counsel attempted to adduce if Innocencio had read parts of the forms but was stopped by the Court. However, Innocencio's subsequent testimony on direct indicated that he read parts of the form. The evidence supports that Innocencio did read at least parts of the form because additionally, the government in its cross of Innocencio elicited from him what parts of the form he had read:

Q Government's Exhibit No. 2. Where it says "nombre," n-o-m-b-r-e, that's your signature, right, sir?

A Yes, sir.

Q Officer Bell certainly didn't threaten you to sign this, right?

A Well, he put it in front of me, for me to sign it.

Q Put a gun to you at the time you signed it?

THE COURT: No. He said there was no gun ever drawn. Come on.

BY MR. R. PEREZ

Q Now, this is your initial right here, right?

A Yes, sir.

Q Si? Did he allow you to initial this when you said he made a mistake, where it says "Houston" and he wrote in "Pasadena"?

A Well, he ordered me to place my initials there.

Q But you knew enough that, when it was 5816 Mavis Lane, you knew that was your address, right?

A Yes, sir. (Suppress Hearing 2R 31, lines 2-21)

Q The only part that you read was your name, Jorge Garza Inocencio, and this number next to your name?

A No. This part here (indicating).

Q What part?

A Where it says, "persons, premises or transports to be examined."

THE COURT: All right. Wait a second.

In your examination by your lawyer, you said you didn't read any of that.

MR. E. PEREZ: Your honor, may I--

THE COURT: No sir. I'm asking the questions. Is that correct?

THE WITNESS: The part above, I didn't read it, Your Honor.

THE COURT: all right. Now, you question, sir?

MR. E. PEREZ: Your Honor, I was objecting to a translation from the court interpreter.

The defendant said premisas, and the translator translated it to premises. I would ask that the court take note that the word "premises," as translated from premisas, means premise as in logic, but not locale or site.

THE COURT: I heard the testimony by the expert witnesses, and I will consider that. Thank you.

MR. E. PEREZ: Thank you, Your Honor.

THE INTERPRETER: Your Honor, I want you to point out also, Your Honor, that there is no other word for me to translate into English but "premises."

MR. E. PEREZ: Your Honor. He could say localidad, or "place," locale, sitio. There is a number of other translations for the word.

THE INTERPRETER: I didn't use the word in Spanish, sir. He used--

MR. E. PEREZ: He's translated "premisas" from Spanish to English, so the only translation can be "premises." But the meaning, your honor, is what I'm objecting to. It means--it does not mean locale.

THE COURT: I understand. I will consider the testimony by the professor in making a decision. (Suppress Hearing 2R 33, lines 16 -- 35, line 3)

REASONS FOR REVIEW

The Court should grant review on this petition for writ of certiorari since the U.S. court of appeals **not only has decided** an important question of federal law that has not been, but should be, settled by this Court, **but also has decided** an important question in a way that conflicts with relevant decisions of this Court.

ARGUMENT

The court of appeals reversibly erred. The totality of the circumstances do not support the trial court's factual and legal conclusions. The written consent form signed by Innocencio without question granted the officers consent to only question Innocencio and not to conduct a search of his house. Further, the overwhelming evidence does not support the trial court's conclusion that Innocencio granted oral consent to a search of his residence, not only because the alleged oral consent was granted contemporaneously with the ineffective written consent to search, but also because the testimony of the government's witness was vague and indefinite, when compared to Innocencio's, as to whether Innocencio **specifically** and **unequivocally** granted such oral consent when considered in light of the fact that consent is not to be lightly inferred and the burden of proof is on the government. Because the trial court's factual findings are not amply supported by the record and clearly against the weight of the evidence, this reviewing court, when considering the totality of the evidence and circumstances, must be left with a definite and firm conviction that a mistake has been made, and reject the trial court's "clearly erroneous" factual and legal maneuvering utilized to overrule Innocencio's motion to suppress.

Because the evidence supports that Innocencio read that part of the written consent form which indicated that he was to be examined at his residence together with the proximity of the oral and written requests supports Innocencio's

contention that he clearly understood Officer Bell to be requesting consent to examine him. The government failed to meet its burden.

At the suppression hearing, the government's agent, Officer Ted Bell, testified that both oral and written consent was given by Innocencio (Suppress Hearing 1R 139, lines 2-7; 166, line 4) but admitted that **the search was conducted relying solely on the signing of the written consent form and that had Innocencio not signed they would not have conducted the search.** (Suppress Hearing 1R 155, lines 7-12; 167, lines 7-17).

The court of appeals erred in sustaining the validity of the search of Innocencio's residence. Because the government relied on an written consent that merely authorized the questioning of Innocencio at his home and was not effective as consent to search, the government cannot now seek to validate the consent based on an alleged oral consent. Further, because the consent form referred to his being "examined" (questioned) at his residence, the courts below erred in its factual determination that Innocencio never read the consent to form and that he could not have mistakenly relied on it translation.

The court of appeals also erred in shifting the burden to Innocencio to prove that the alleged oral consent was involuntary. It is the government's burden to prove that consent to search is voluntary. Because there is overwhelming evidence tends to support Innocencio's contention he never understood he was giving consent to a search of his residence, the court of appeals, by not requiring that the government provide a clear and complete record on the issue, in effect shifted the burden to Innocencio. Alternatively, if the burden was not shifted to Innocencio, the government's burden was lessened due to the fact that the government's burden was allowed to be met with just the conclusive testimony of an officer that oral consent was given and no other supporting factual evidence. The

overwhelming record evidence, which was totally ignored by the court of appeals, was that Innocencio understood that he was consenting to be questioned at his home. In fact that same officer testified that "it appeared" that Innocencio understood him. The court of appeals ignored the law which requires the government prove more than "it appeared" Innocencio understood.

A. Alleged oral consent unavailable to justify search conducted on the basis of an invalid written consent.

The court of appeals decision to uphold the search on the basis of an alleged oral consent is in conflict with the holding in Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). There the Court, through Mr. Justice White, stated:

> when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. 391 U.S. at 548-550; 88 S.Ct. at 1792.

Innocencio submits that because the government's clear and uncontroverted testimony was that the search would not have been conducted unless Innocencio signed the written consent, that as in Bumper, supra, the courts below cannot justify the government's search on the basis of oral consent once it turned out that the written consent relied upon was invalid.

B. Innocencio read parts of written consent form

Contrary to the review standards of Ornelas v. U.S., 116 S.Ct. 1657, 1663 (1996), the court of appeals erroneously factually concluded that Innocencio did not read any part of

the consent form, and could not have relied on its translation causes the focus to shift strictly on whether oral consent to search was given by Innocencio (Pet.App. 8). Because the written consent form is insufficient to grant consent, Innocencio submits the issue is indeed whether oral consent to search was given.

The trial court concluded in its findings of facts and conclusions of law that **Innocencio read and signed a written consent form** to search his residence located at 5816 Mavis Lane, Pasadena, Texas. (Pet.App. 37 at pgh. 23; 43 at pgh. 44). However, in its legal conclusions the trial court concluded that the written form did not invalidate the consent since **Innocencio did not read the consent form**. (Pet.App. 52 at pgh. 33).

However, the trial court's legal conclusion is in conflict with its finding of fact and with the evidence (which was that Innocencio did not read the written consent form) as hereinbelow noted. Ignoring the finding of fact and the overwhelming evidence at the suppression hearing that Innocencio read parts of the written consent form (Suppress Hearing 2R 15, line 6--16, line 16; 31, lines 11-21; 33, lines 15-21; 38, lines 7-12; 39, lines 4-6) leads to an incorrect legal conclusion predicated on the court's mistake and illogical factual conclusion.

The court of appeals also concludes (Pet.App. 7) that Innocencio testified that he did not read the form and that because he never read the form could not have mistakenly relied on its translation.

Innocencio's answer that he did not read the document (form) was a correct response to a global question as to whether he had read the whole document. Innocencio's attorney then questioned Innocencio as to whether he had read parts of the document. An answer was not allowed by the trial court. This Court has taken Innocencio's answer, that he did not read the whole document out of context. His

testimony is clear on his reading part of the written consent form.

Innocencio submits that because the evidence supports the fact that he read the part of the consent form which indicated that he was consenting to being "examined" (questioned) at his residence, then the issue of whether he clearly and unequivocally understood that he gave oral consent to search must be weighed based (contrary to the court of appeals conclusion), on his reliance and understanding of the written consent form.

The trial court further reached a factual and legal conclusion that Innocencio's act of signing the consent form signified that he intended to memorialize what he had previously agreed to when he allegedly consented verbally to the search of his residence. (Pet.App. 52 at pgh. 33). North Carolina v. Butler, 441 U.S. 369, 374, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979), stands for the proposition that a prosecutor relying upon consent "has the burden of proving that the consent was, in fact, freely and voluntarily given" and that "an express written or oral statement of waiver of right ... is usually strong proof of the validity of that waiver". In Innocencio's case because the written consent as relied upon and understood by Innocencio was a consent that he be examined at his residence, it must stand as strong proof that he was also verbally granting consent to be questioned and not to search his residence. How then, Innocencio submits, can the fact that the written consent he signed was ineffective to give (written) consent to search his residence then be utilized by the trial court as "memorializing" the alleged oral consent. The converse is true. If it memorialized anything it was what Innocencio has always maintained, which is that the oral consent given by him was the same as the written, and authorized only that he be "examined" and not that his residence be searched. The conclusions of the courts' below are illogical and not supported by the evidence or law requiring that consent to search not be lightly inferred. Phelper v. Decker, 401 F.2d 232, 236 (CA5 1968).

The courts below cannot infer that oral consent to search was granted from an ineffective written consent form. Innocencio submits the ineffective written consent form supports the fact he only gave oral consent to be questioned and thus the government failed to meet its burden.

The courts below in their findings of facts committed "clear error" and abused discretion because such findings were not supported by a preponderance of the evidence, and as such this Court, upon reviewing the entire evidence should be left with a definite and firm conviction that a mistake has been made because Innocencio read that part of the consent form indicating he was to be examined at his home. See U.S. v. Williams, 69 F.3d 27, 28 (CA5 1995).

In fact, it was the government's contention, throughout the course of the case in its documents filed in this cause, that **Innocencio read the consent form**. (Record on Appeal Tab 80, U.S. Supplemental Response to Motion to Suppress, p. 9; Record on Appeal Tab 91, Govt's Proposed Findings of Fact and Conclusions of Law, p. 9; Record on Appeal Tab 97, Govt's Amended Proposed Findings of Fact and Conclusions of Law, p. 9; and, Record on Appeal Tab 114, Govt's Trial Memorandum, p. 9).

Although Innocencio agrees with the trial court's findings of fact that he read (at least parts of) the consent form, he does not agree with its contradictory legal conclusion that Innocencio did not read or that the consent from authorized a search of his residence. Innocencio submits that the overwhelming evidence, being the form itself and Innocencio's testimony of what he understood the form to mean, coupled with the expert's testimony, conclusively proved that the written consent form signed by him could not under any circumstances be considered as a consent to search his residence.

Innocencio submits that ineffective was the written consent form signed by him, which was the government's sole reliance for conducting the search of his home. Primarily the consent form was defective in its translation. The trial court made a factual determination, which was supported by the expert testimony, that the Spanish language version of the written waiver form signed by Innocencio translates the English word "premises" into the Spanish word "premisas", and that in Spanish this word means premises in the sense of logical proposition, not having the meaning of residence or location. (Pet.App. 37 at pgh. 24) Further, Innocencio's uncontroverted language expert's testimony was that the Spanish word "examinar" does not suggest a search. (Suppress Hearing 1R 229, lines 2-5)

For this reasons alone the consent form could never have been used as evidence to support "consent" to search a home, building, residence, local, site, etc., without first interlineating the form with a correct Spanish word translation which was not done in the present case.

Secondly, and perhaps more importantly, even if the Spanish word "premisas" could in any way or fashion be given a meaning to suggest a residence, house, building; etc.; or if the consent form had had a correct word interlineated, it would still nonetheless be insufficient evidence to support "consent" (to search a residence) because the blank in the form which had to be filled with the name, address or description of the persons, place or vehicle to be "searched", contained the name of Innocencio and his Texas Driver's License number as the person to be "examined" and had no address or description of any vehicle to be searched or "examined." The language expert testified that the form signed by Innocencio authorized only that Innocencio be "examined" and not that any "premisas" be "examined":

> Q In the English version, which is Exhibit No. 3, Where it says person, premises or conveyance to be searched. It's blank underneath there, right?

A On the English version?

Q Yes. There is blanks underneath there?

* * * * *

A The name Jorge Garza Inocencio and a Texas driver's license number.

Q So the form would authorize that Jorge Garza Inocencio be examined?

A That's right.

Q His persona ser examinado, Jorge Garza Inocencio?

A Right.

Q Premisas ser examinado. Any premisas to be examined?

A Well--

Q In these blanks? Corresponding blanks?

A There is nothing in the blanks other than the name of Jorge Garza Inocencio and a Texas driver's license number. (Suppress Hearing 1R 227, line 1 -- 228, line 2)

Innocencio testified that he read that part interpreted by the expert, (Suppress Hearing 2R 33-35) and that he understood the signing of the form not as granting consent to search the house but only as agreeing to be asked questions. (Suppression Hearing 2R 37, lines 16-18; 14, line 25 -- 15, line 5) A thorough reading of the language expert's testimony corresponds with Innocencio's testimony indicating that his understanding of the written consent form was that he would be "examined" at his residence.

Comparing the consent forms signed by Innocencio, introduced as government's exhibit number 2, to those signed by Tovar and Elizondo, clearly supports Innocencio's contention that he thought he was consenting to be examined/questioned. The consent form signed by Innocencio, which was also filled out on the Spanish side version, undoubtedly can only indicate that Jorge Garza Inocencio, TDL 09669885 was the person to be "examined" and that said "examination" would take place at 5816 Mavis Lane, Pasadena, Texas. (Record Excerpt, Tab 5).

C. Innocencio's oral consent only allowed his questioning and did not authorize a search of his residence.

Officer Ted Bell testified Innocencio gave oral consent:

A ... and I asked him if I could have permission to conduct a search of his residence to see if there was any illegal contraband, and he said yes.

Q Did you then ask him for written permission to search his residence?

A Yes, I did. (Suppress Hearing 1R 139, lines 2-7)

On cross Officer Ted Bell testified as follows:

Q Okay. What did you tell him you were going--when you asked him in spanish for verbal consent, how did you ask him.

A (In Spanish) With your permission, allow us to make a search in your house.

Q Do you know whether he understood that or not?

A He appeared to. (Suppress Hearing 1R 166, lines 12-17)

The clear meaning of Officer Ted Bell's testimony regarding for oral consent is that he did not request of Innocencio for permission to search the house, but affirmatively stated that they would make a search in Innocencio's home. As to whether Innocencio's alleged oral consent was specific and unequivocal and his understanding, Officer Bell's testimony was merely that "he appeared to". Innocencio submits that the court's determination that he granted oral consent was clearly erroneous in that the aforestated evidence does not prove by a preponderance of the evidence that he understood that he was giving such consent.

When the tentative testimony of Officer Bell on whether Innocencio understood that he was giving consent to a search of his house, is compared to the specific testimony of Innocencio, **the clearly erroneous factual finding is evident**. This is even more evidence when you consider that the alleged granting of the oral consent was contemporaneous with the signing of the written form which as clearly noted hereinabove was effective only to grant consent to examine Innocencio and not to search his residence.

D. The courts below required Innocencio to prove the alleged oral consent was involuntary.

The voluntariness of consent to search, which may not be lightly inferred, is a question of fact to be determined from the totality of circumstances. U.S. v. Cooper, 43 F.3d 140, 144 (CA5 1995); Phelper v. Decker, 401 F.2d. 232, 236 (CA5 1968). The government has the burden of proving by a preponderance of evidence that consent to search was voluntary. Cooper, supra, at 144.

The court of appeals, by simply accepting, (on the basis of the record and totality of circumstances), the testimony of an officer, with nothing more, "lightly inferred" consent and in effect shifted the burden to Innocencio to prove that he did not give consent. The record is not clear on what Spanish

word Officer Bell used to translate the word "search". Because the record indicates Innocencio understood he only gave consent to be questioned at his home, the government failed to meet its burden.

The record does not reflect which Spanish word by Officer Bell used for "search." By accepting that Innocencio understood Officer Bell, the courts below shifted to Innocencio the burden of making a complete record.

The evidence of oral consent from Officer Ted Bell is set out above at page 21.

To allow the alleged oral consent on such skimpy evidence without proof on the record of what words Officer Bell used for the term "search" in effect shifts to burden to Innocencio to not only provide a complete clear record but also to prove that he did not give consent.

E. Government's burden to prove consent lightened.

The clear meaning of Officer Ted Bell's testimony regarding the request for oral consent is that he did not request of Innocencio for permission to search the house, but affirmatively stated that they would make a "search" in Innocencio's home. Because Officer Bell indicated that he wanted to make a "search" in your home, and there is no indication what Spanish word Officer Bell used for the term "search", the government failed to meet it's burden of proving that Innocencio gave oral consent and disapprove that what Innocencio understood was that "they was only to ask some questions."

Further, as to whether Innocencio's alleged oral consent was specific and unequivocal and his understanding of Officer Bell, Bell's testimony was merely that "he appeared to". Innocencio submits that the court's determination that he granted oral consent to search his residence was clearly erroneous in that the aforestated evidence does not prove by

a preponderance of the evidence that he understood that he was giving such consent.

The record is supports Innocencio's contention he understood Officer Bell orally requesting permission to question him at his home. This courts below ignored that evidence. From the beginning, Officer Bell informed Innocencio he was interested in questioning him. (See above at p. 21; Suppress Hearing 1R 137, line 21 -- 137, line 4)

Innocencio often testified of understanding Officer Bell to be **requesting consent to question** him inside the house on the investigation, **but not for consent to search the house**:

> Q After you felt you were arrested by this officer, did you have an occasion to speak with an officer who testified the last time we were here, on Friday? Officer Ted Bell?
>
> A Yes, sir.
>
> Q Was that conversation in English or in Spanish?
>
> A In Spanish.
>
> Q Did you understand the conversations you were having with him?
>
> A Yes, he told me that he was going to ask me some questions. (Suppress Hearing 2R 11, line 10)
>
> Q During the questioning by Officer Bell, did he at any time request for your permission to search your house?
>
> A No, sir.

Q Did you ever understand him to want to search your house?

A No, sir.

Q Did you understand everything he was telling you?

A Well, some of the things.

Q What do you mean, some of the things?

A Well, because he doesn't speak very good English.

Q English?

A I mean Spanish. (Suppress Hearing 2R 12, line 20 -- 13, line 5)

Q Now when you signed this instrument, did you think you were giving consent to search your house?

A No, sir.

Q What is it that you thought you were acquiescing to?

A Only that they were investigating my person, asking me questions. (Suppress Hearing 2R 14, line 25 -- 15, line 5)

Q Okay. And what did you understand was going to happen to you when you signed this document?

A Well, they was only to ask me questions.

Q And how did you determine that?

A Because there were--my name is right above. It says "person," and that's what I understood.

Q Is that what Officer Bell had told you, that you were going to be questioned if you signed it?

A Yes, sir. (Suppress Hearing 2R 15, line 22 -- 16, line 5)

THE COURT: What is the word you would use for "search"?

WITNESS: Catear.

THE COURT: How do you spell it?

INTERPRETER: C-A-T-E-A-R.

THE COURT: Okay. Go on.

BY MR. PEREZ:

Q Were those words ever used by Officer Ted Bell?

A No, sir. (Suppress Hearing 2R 17, lines 10-19)

Q And up until that point, you and he were communicating pretty well in Spanish, right?

A Yes, we were having a conversation in Spanish.

Q You understood what he told you, and you felt that he understood what you were telling him, right?

A Well, many words I did not understand. (Suppress Hearing 2R 28, lines 19-24)

Q Sir, isn't it true that the whole gist of you and Officer Bell's conversation in the driveway and inside your house, before the cocaine was found, was whether Officer Bell could search your house?

A No. He never told me that he wanted to search the house.

Q You are telling the court, under oath here, from the time you arrived at the driveway to the time the cocaine was found in your house, that he never discussed him or other law enforcement personnel your house?

A No, sir.

Q Never? That never came up?

A No, Sir.

THE COURT: Okay. That what he says.

BY MR. R. PEREZ:

Q Did he ask you for your permission to search your logic?

A I never understood that he wanted to make a search. (Suppress Hearing 2R 35, lines 6-21)

THE COURT: Did the officer ever ask you at any time permission to search your house, ever?

THE WITNESS: No, sir.

THE COURT: Did you understand that, by signing that document, you would be giving permission to search the house?

THE WITNESS: No, sir. (Suppress Hearing 2R 37, lines 13-18)

The clearly erroneous factual findings are evident upon comparing the tentative ("he appeared to") testimony of Officer Bell on whether Innocencio read and understood that

he was giving oral and written consent to a search of his house, to the specific testimony of Innocencio. This is even more evident when one considers that the alleged granting of the oral consent was contemporaneous with the signing of the written form which as clearly noted hereinabove was effective only to grant consent to examine Innocencio and not to search his residence. To judicially find Innocencio orally consented to the home search on such skimpy evidence lessens the government's burden of proof so low as to require Innocencio to prove the oral consent was involuntary.

CONCLUSION

The totality of the circumstances do not support the trial court's factual and legal conclusions. The written consent form signed by Innocencio without question granted the officers consent to only question Innocencio and not to conduct a search of his house. Further, the overwhelming evidence does not support the trial court's conclusion that Innocencio granted oral consent to a search of his residence, not only because the alleged oral consent was granted contemporaneously with the ineffective written consent to search, but also because the testimony of the government's witness was vague and indefinite, when compared to Innocencio's, as to whether Innocencio **specifically** and **unequivocally** granted such oral consent when considered in light of the fact that consent is not to be lightly inferred and the burden of proof is on the government. Because the trial court's factual findings are not amply supported by the record and clearly against the weight of the evidence, this reviewing court, when considering the totality of the evidence and circumstances, must be left with a definite and firm conviction that a mistake has been made, and reject the trial court's "clearly erroneous" factual and legal maneuvering utilized to overrule Innocencio's Motion to Suppress.

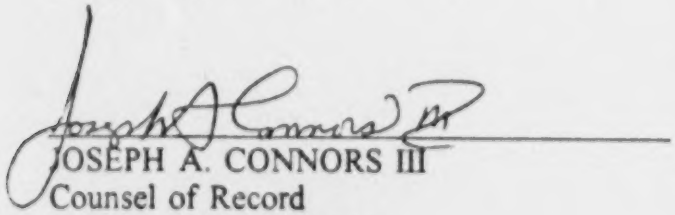
By affirming the district court, the court of appeals erroneously concluded that the search of Innocencio's residence was done in reliance of an alleged oral consent and

not on the invalid written consent. The evidence is overwhelmingly contrary to the court of appeals' erroneous factual conclusion that Innocencio did not read the written consent form and thus could not have mistakenly relied upon it. Error was also committed by the court of appeals' **shifting of burden to Innocencio** to supply a complete and clear record on what Spanish word was used by Officer Bell to translate the word "search," **and to disprove the voluntariness of the alleged oral consent**. Alternatively, if the burden was not shifted to Innocencio, the court of appeals illegally lessened the government's burden by "lightly inferring" oral consent in light of the skimpy relevant evidence.

The petition for a writ of certiorari should be granted.

Date: Signed on November 20, 1997

Respectfully submitted by
Petitioner's attorney,



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(2)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JORGE ALBERTO INNOCENCIO,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-21094

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PEDRO ELIZONDO GARZA; JORGE INNOCENCIO; HOMERO HINOJOSA GARCIA; OZIEL ALANIS,

Defendants-Appellants.

Appeals from the
United States District Court
For the Southern District of Texas

Before POLITZ, Chief Judge, DeMOSS, Circuit Judge, and DOHERTY,[1] District Judge.

DeMoss, Circuit Judge:

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[1] District Judge of the Western District of Louisiana, sitting by designation.

A jury convicted the defendants, Jorge Inocencio, Pedro Elizondo Garza, Homero Hinojosa Garcia, David Tovar[2] and Oziel Alanis, of conspiracy to possess with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. Tovar and Oziel were convicted on other counts of aiding and abetting the possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2. Inocencio, Garza, and Garcia were also convicted of money laundering under 18 U.S.C. §§ 1956(a)(1)(A)(I) and 1956(g). The defendants appeal from the judgments of conviction entered and sentences imposed by the district court following a jury trial. After reviewing the record, we find that insufficient evidence exists to support the money laundering conviction as to Garza and Garcia. As to all other convictions and sentences, finding no error, we affirm.

BACKGROUND

On January 26, 1995, based on information supplied from a prior investigation, law enforcement officers set up surveillance on Garcia and Garza at a Days Inn in Houston, Texas. Houston Police Officer Jerry Nimmo observed Garcia seated in a red Buick Regal which was parked on a curb near the entrance to the Days Inn parking lot. Garcia appeared to be waiting for someone and conducting counter surveillance. Garza approached the Buick, entered the driver's side of the car, and drove down the road. Garza then stopped the car and Garcia got out, looked around, and reentered the car. Garza then made a u-turn and drove back to the Days Inn.

Garza then entered the motel while Garcia waited in the back seat of the Buick. Thereafter, Garza reappeared carrying a tan sports bag. Tovar walked toward the Buick with Garza. Garza placed the sports bag on the driver's side

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[2] Tovar died on August 12, 1996, and his cause has been dismissed by order of this Court.

floorboard. Officer Nimmo then observed the three defendants conversing outside their vehicles. Tovar then turned and walked back to a black Camaro. Garza and Garcia left in the Buick. Tovar followed in the Camaro.

Garza and Garcia drove to an apartment complex and made two "heat runs" before entering the complex. Tovar headed toward the interstate. The Buick parked in front of apartment 2142, which was later found to be Tovar's apartment. Garza then drove the Buick to a "J.D. Sales" store in Pasadena, Texas. He was seen making two "heat runs" past the store before returning. Garza then drove the Buick to Mavis Lane in Pasadena where observation of the Buick ended. A surveillance perimeter was established around the neighborhood.

Officers saw Garza and Garcia again that afternoon in a blue Chrysler New Yorker. Garza and Garcia stopped in a Texaco gas station and used a pay phone at that location. Sometime thereafter, Inocencio arrived at the Texaco in a black Mercury Marquis. Inocencio pulled up next to the Chrysler and handed a green field jacket to Garcia. The two cars then left in opposite directions.

Around 3:00 p.m., the Chrysler pulled into a Conoco gas station. Garza used the pay phone and made a "pager type" call and then left the gas station. Officers stopped the Chrysler at 3:20 p.m. in the 3800 block of Spencer Highway in Pasadena. Speaking in Spanish, Sergeant Pohlman identified himself and ordered Garza and Garcia to raise their hands. Garcia kept lowering his hands, forcing the officer to reach inside the vehicle and place his hands across Garcia's elbows. The officer saw a 9mm pistol between Garcia's leg and the arm rest and seized the gun from the car. Garza and Garcia then exited the vehicle and Officer Bell advised them in Spanish that they were being investigated and that the officers wanted to speak with them.

During questioning, Garza told Officer Bell that he was not acquainted with anyone owning a black Camaro and that he had just purchased a pickup from J.D. Sales. Garza then read and signed a consent form to search the Chrysler. Police found a loaded .40 caliber Smith & Wesson pistol inside the green jacket Inocencio had handed Garcia. A telephone address book was also seized.

Meanwhile, outside the Mavis Lane residence of Inocencio, Police stopped Inocencio and explained that they were conducting a narcotics investigation and asked if they could question him inside the residence. Inocencio invited the officers inside. Inocencio first orally consented to a search of the premises and then signed a consent form to search the house. Police discovered 104 kilograms of cocaine in packages with labels of joker cards and a "red ace of clubs" concealed in luggage in attic space next to an upstairs bedroom.[3] Officers also found approximately $5 million in cash as well as ledgers and notebooks documenting drug transactions. The ledgers and notebooks indicated that 609 kilograms of cocaine had been sold for approximately $7,964,000, of which $6,189,000 had been received. Officers also found scales, a Smith & Wesson box with the same serial number as the gun found between Garza and Garcia in the Chrysler, an adding machine with adding machine tape, and loaded handguns and ammunition.

Around 4:00 p.m., officers stopped Tovar, Oziel, and another man in a Lincoln Town Car. After much consternation, Tovar consented to a search of his car and his apartment. In the car, officers found one kilogram of cocaine labeled with a red ace of clubs in a potato chip bag under the front passenger-side seat and $2,285 in cash in the glove box. In Tovar's apartment, officers discovered approximately 6

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[3] We are aware of the fact that clubs are traditionally black cards; but the record is clear that red was the color in this case.

kilogram-sized packages of cocaine labeled with a red ace of clubs, two stolen loaded handguns, a lathe used to design silencers, silencers, silencer parts, and a digital scale. A date book and address book were also seized.

Inocencio, Garcia, Garza, Tovar, and Oziel were charged in Count One of a four count indictment with conspiracy to possess cocaine with intent to distribute. Count Two charged Inocencio, Garcia, and Garza with aiding and abetting persons to knowingly and intentionally possess with intent to distribute more than 5 kilograms of cocaine. Count Three charged Tovar and Oziel with aiding and abetting persons to knowingly and intentionally possess with intent to distribute more than 5 kilograms of cocaine. Count Four charged Inocencio, Garcia, and Garza with knowingly and willfully attempting to launder money in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 1956(g).

A jury found the defendants guilty on all counts in the indictment. The district court sentenced Inocencio to 365 months imprisonment. Garcia received 405 months and Garza was sentenced to 365 months. The defendants filed timely notices of appeal.

ANALYSIS

1. The Search of Inocencio's Home

On appeal, Inocencio contends that the district court erred in denying his motion to suppress the warrantless search of his home. Inocencio contends that law enforcement officers arrived at his residence and asked if they could question him. Because Inocencio does not adequately speak nor understand English, one officer questioned him in Spanish. The Spanish speaking officer testified that Inocencio verbally consented to a search of his home. The officer then asked Inocencio to sign a written consent form which, in Spanish, explained his right to refuse consent. Inocencio signed the form.

The form states in pertinent part "Persona, Premises o Transporte a ser examinado." Expert testimony revealed that the form was incorrectly translated from English to Spanish. The English version of this caption stated "person, premises or conveyance to be search." In the translation to Spanish, the word "premises" was changed to "premisas" which, in Spanish, means "logical proposition" or "the premise of the argument." Testimony revealed that "premisas" does not refer to premises or relate to a home or residence. Further, officers only filled out Inocencio's name under the heading. They did not fill-out the space for place, or conveyance to be searched.

According to Inocencio, this omission suggests that he was only to be subject to an "examinado." In support, he contends that the written form uses the verb "examinar" which means to examine. Inocencio maintains that he thought this "examination" would be oral and did not understand that he had consented to a "catear" or "registrar," two words which correctly translate to the verb "search" in English. Inocencio also testified that he did not understand that his oral consent to search included his home. He stated that he only agreed to a search of his person and his automobile. As such, he maintains that the search of his residence was improper.

We review a motion to suppress based on live testimony at a suppression hearing for clear error, viewing evidence in the light most favorable to the prevailing party, in this case, the government. See United States v. Levine, 80 F.3d 129, 132 (5th Cir.), cert. denied, 117 S.Ct. 83 (1996); United States v. Piaget, 915 F.2d 138, 139-140 (5th Cir. 1990). The district court based its decision on the following findings and conclusions:

> The fact that the Spanish translation of the consent form contained an incorrect translation of the word "premises" does not invalidate the consent given by Inocencio. Given that

> Inocencio testified that he never read the form, and given the statements made to him by Officer Bell, Inocencio's act of signing the document signifies to the Court that Inocencio intended to memorialize what the defendant had previously agreed to when he verbally consented to the search of the Mavis residence.

The district court heard testimony from Inocencio that he had been living in the United States since 1978. Further, Inocencio testified that he never read the consent to search form. The district court also heard testimony from the officers and Inocencio about Inocencio's verbal consent to search of his home.

After reviewing the record, we find no clear error with the district court's decision. The fact that the consent form was incorrectly translated is irrelevant given that Inocencio never read the form and could not have mistakenly relied on its translation. As such, this case turns on whether oral consent to search was given by Inocencio. In making this determination, the district court was in the best position to weigh the credibility of the testimony of Officer Bell and Inocencio and ascertain that Inocencio did understand that he gave oral consent to search his home. We will not second guess the district court's factual findings as to the credibility of witnesses. See United States v. Botello, 991 F.2d 189, 194 (5th Cir. 1993); United States v. Coburn, 876 F.2d 372, 374 (5th Cir. 1989). Further, we will not disturb findings of fact unless we are left with the definite and firm conviction that a mistake has been made. See Botello, 991 F.2d at 194. Once the officers obtained oral consent to search Inocencio's home, the search was valid, notwithstanding the incorrectly translated consent form.

2. *Sufficiency of the Evidence - Drug Convictions*

"In reviewing an appeal based on insufficient evidence, the standard is whether any reasonable trier of fact could

have found that the evidence established the appellant's guilt beyond a reasonable doubt." United States v. Jaramillo, 42 F.3d 920, 922-923 (5th Cir. 1995). We consider evidence in the light most favorable to the verdict. See id. at 923.

To establish a violation of 18 U.S.C. § 841(a)(1) and (b)(1)(A), the government must prove that the defendants (1) knowingly (2) possessed narcotics (3) with intent to distribute. See United States v. Skipper, 74 F.3d 608, 611 (5th Cir. 1996). "Possession may be either actual or constructive and may be joint among several people." Id. Possession may also be proven by direct or circumstantial evidence. See United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992).

A. Garza and Garcia

Garza and Garcia contend that the government failed to establish that they joined or furthered the purpose of this conspiracy. They argue that the government presented no evidence other than their mere presence and association with the narcotics found in connection with Inoncencio and Tovar. We disagree.

Garza and Garcia participated in counter surveillance before rendezvousing with Tovar at the Days Inn and en route to Tovar's apartment and Inocencio's house. Garza and Garcia met with Tovar, whose apartment and car contained narcotics. The packages of cocaine found in Tovar's car and residence had the same label as the packages found in Inocencio's home. Garza and Garcia also met with Inocencio at a Texaco gas station where Inocencio gave them a green jacket with a firearm. Inocencio also told officers during questioning that Garza and Garcia were staying at his home. Garcia's fingerprints were found on drug ledgers and adding machine tapes in Inocencio's home. Garcia's fingerprints were also found on one of the boxes containing money found inside Inocencio's residence. Garcia carried Inocencio's

pager number. Finally, officers found two firearms in the car occupied by Garza and Garcia.

Based on this evidence, the government clearly presented sufficient evidence to show that Garza and Garcia "'became associated with, participated in, and in some way acted to further the possession and distribution of drugs.'" United States v. Inocencio, 40 F.3d 716, 726 (5th Cir. 1994) (quoting United States v. Chavez, 947 F.2d 742, 745-46 (5th Cir. 1991)). Consequently, a reasonable jury could conclude that Garza and Garcia knowingly possessed cocaine with intent to distribute.

B. Oziel

Oziel also contends that insufficient evidence exists to support his conviction. Oziel argues that his name on the drug ledgers found in Inocencio's residence, and his mere presence in Tovar's car, are the principal evidentiary pieces linking him to this conspiracy and, these facts alone, cannot support a conviction.

The government presented evidence that a notebook with a picture of a "Killer Whale" found at Inocencio's home had a written entry that Oziel received 25 kilograms of cocaine on the day he was arrested. Officers found cocaine with a label of the red ace of clubs and $2,285 in cash in the car occupied by Tovar and Oziel. Identically labeled packages of cocaine were found in Tovar and Inocencio's homes. Oziel's fingerprints were found on a box containing two of the six kilograms of cocaine inside Tovar's home. Further, Oziel was a passenger in Tovar's car on the same day that Tovar met with Garcia and Garza. Evidence also showed that Oziel entered the United States the day before his arrest. This evidence, taken together could lead a reasonable jury to conclude that Oziel was in fact involved in this conspiracy. As such, we hold that sufficient evidence exists to support his conviction.

3. Sufficiency of the Evidence - Money Laundering

Garza and Garcia contend that insufficient evidence exists to support their convictions under 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(g) for money laundering.[4] To secure a conviction for conspiracy to commit money laundering, the government must prove that the defendants knew of the conspiracy and voluntarily joined it. United States v. Ismoila, 100 F.3d 380, 387 (5th Cir. 1996). As to money laundering, the government must prove that the defendants (1) knowingly conducted a financial transaction (2) that involved the proceeds of an unlawful activity (3) with the intent to promote or further that unlawful activity. United States v. Thomas, 12 F.3d 1350, 1360 (5th Cir. 1994).

Garza and Garcia maintain that the government has failed to show any agreement by them to engage in any financial transaction. Garza and Garcia also argue that, in fact, no evidence exists to show that a financial transaction occurred. According to Garza and Garcia, the only evidence identified by the government consists of storage of currency and cocaine at Inocencio's Mavis Lane residence. No proof of wire transfers or other transactions involving currency was presented.

After reviewing the record, we agree with Garza and Garcia. The government failed to present evidence of a financial transaction involving these defendants. A "financial transaction" pursuant to § 1956 is "a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments...." 18

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[4] Inocencio was also charged and convicted in Count IV of money laundering. Inocencio did not raise the issue of whether sufficient evidence exists to support the money laundering conviction in his brief on appeal. As such, we do not address the validity of his conviction on this count.

U.S.C. § 1956(c)(4)(A). "By definition, then, a 'financial transaction' must, at the very least, be a 'transaction,' i.e., 'a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition' or some action involving a financial institution or its facilities." United States v. Puig-Infante, 19 F.3d 929, 938 (5th Cir. 1994) (citing 18 U.S.C. § 1956(c)(3)).

When some "transaction" that does not involve a financial institution or its facilities is charged, the government must show that a "disposition" took place. A "disposition" has been defined by this Court to mean "'a placing elsewhere, a giving over to the care or possession of another.'" Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 654 (1961)). We also note that currency does not become proceeds of drug trafficking until a drug sale has been completed. See United States v. Gaytan, 74 F.3d 545, 555-56 (5th Cir.), cert. denied, 117 S.Ct. 77 (1996).

In this case, the government argues that "the collection of more than $11 million in less than a six week period of time, Oziel's presence from Mexico, and the presence of $5 million in drug proceeds support the inference of a disposition of the drug proceeds handled by Garcia and Garza and the inference of intent to commit money laundering...." Notwithstanding this inference-filled exposé, currency found by officers in connection with a drug trafficking offense, by itself, is insufficient evidence to support a money laundering conviction. See Puig-Infante, 19 F.3d at 938; United States v. Ramirez, 954 F.2d 1035, 1039-40 (5th Cir. 1992).

The government presented evidence that $2 million in proceeds had been collected and forwarded to Colombian producers and a stockpile of $5 million in cash was found at Inocencio's residence. However, no evidence was presented that Garza or Garcia handled these proceeds or were, in any way, involved in the "disposition" of these funds. While the jury may draw reasonable inferences from the evidence presented, nothing reasonable could be inferred from this

evidence. As such, we reverse Garza's and Garcia's convictions for money laundering and remand their cases to the district court for resentencing in light of this disposition.

4. Evidentiary Rulings

Garza and Oziel contend that the district court abused its discretion by admitting extrinsic evidence of silencers and silencer-making materials found in Tovar's apartment in violation of FED. R. EVID. 404(b). The government contends that this issue was not properly raised in the trial court and, therefore, should be reviewed only for plain error. See United States v. Misher, 99 F.3d 664, 670 (5th Cir. 1996).

Even if objections to the admission of this evidence were properly raised, we find no abuse of discretion with respect to its admission. The silencers and silencer-making materials were found contemporaneously with the six kilograms of cocaine found in Tovar's apartment. Firearms and silencers are deemed to be parts of the tools-of-the-trade of drug trafficking and are relevant intrinsic proof of an ongoing conspiracy. As such, this evidence tends to show that the defendants were involved in a major drug trafficking conspiracy complete with a number of firearms and silencers.

Additionally, the district court properly determined that the probative value of the evidence was not substantially outweighed by its potential prejudicial effect. FED. R. EVID. 403. Danger of prejudice is always present. Consequently, exclusion of extrinsic evidence based on its prejudicial effect "should occur only sparingly." See United States v. Leahy, 82 F.3d 624, 637 (5th Cir. 1996) (quoting United States v. Pace, 10 F.3d 1106, 1115 (5th Cir. 1993)). Finding no abuse of discretion, we affirm the decision of the district court to admit evidence of the silencers and silencer-parts discovered in Tovar's apartment.

5. Sentencing Issues

Oziel contends that the district court erred in enhancing his base offense level by two levels for possession of firearms pursuant to United States Sentencing Guidelines (U.S.S.G.) § 2D1.1(b)(1). Section 2D1.1(b)(1) provides for a two-level increase to the base offense level if a dangerous weapon was possessed during the commission of a drug trafficking offense. Oziel argues that he did not possess a firearm and that he had no knowledge of the firearms that were recovered. He further asserts that it was not foreseeable that his co-defendants would possess firearms, especially in light of that fact that he arrived in Houston from Mexico only 48 hours before his arrest.

We review a district court's decision to apply § 2D1.1(b)(1) for clear error. See United States v. Rodriguez, 62 F.3d 723, 724 (5th Cir. 1995). Although a conviction on a substantive count requires proof beyond a reasonable doubt, the district court may sentence a defendant within the Sentencing Guidelines on any relevant evidence that "has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3; see also United States v. Buchanan, 70 F.3d 818, 828 (5th Cir. 1995), cert. denied, 116 S.Ct. 1340 (1996). Further, once the government establishes that a firearm was present during the offense, the adjustment should be applied "unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1), comment. (n.3). In this case, there is no question that the firearms were connected with this offense. Firearms and cocaine were found in vehicles, in an apartment, and in a house, and all the evidence was connected to the defendants.

Oziel's contention that the firearms were not foreseeable also fails. We have held that a district court "'may ordinarily infer that a defendant should have foreseen a codefendant's possession of a dangerous weapon, such as a firearm, if the government demonstrates that another participant knowingly

possessed a weapon while he and the defendant committed the offense.'" United States v. Sparks, 2 F.3d 574, 587 (5th Cir. 1993)(quoting United States v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990)). It was readily foreseeable that firearms would be employed as tools of the drug trafficking trade. As such, we find no error, clear or otherwise, with the district court's application of § 2D1.1(b)(1).

Next, Oziel argues that the district court erred in denying his motion for a downward adjustment for his mitigating role in the offense under U.S.S.G. § 3B1.2. Oziel relies primarily on his responsibility for only 25 kilograms of the 1,555.5 kilograms of cocaine attributable to the conspiracy. He contends his amount of cocaine represents a mere two percent of the total. However, Oziel has not demonstrated that he was substantially less culpable than the other participants in this conspiracy, and, as a result, we find no clear error. See U.S.S.G. § 3B1.2(b); United States v. Brown, 54 F.3d 234, 241 (5th Cir. 1995).

Finally, Garcia contends that the district court erred in sentencing him based on the quantity of cocaine memorialized in the drug ledgers seized from Inocencio's residence. Garcia maintains that he was only in Inocencio's house for two days and that the government failed to show that he ever bought, sold, traded, transported or delivered any of the cocaine found in the house. Further, the district court erred by failing to make specific fact findings concerning the quantity of cocaine attributable to each defendant.

Assuming Garcia properly preserved these issues for appeal, we find no clear error with the district court's decision to assign more than 150 kilograms to Garcia. See Rodriguez, 62 F.3d at 724. The evidence and testimony at trial clearly demonstrated that the cocaine and money found in Inocencio's house and in Tovar's apartment were the product and proceeds of this extensive drug trafficking operation. Evidence also showed that Garcia was present

inside Inocencio's house and that he handled adding machine tapes and drug ledgers. Garcia's fingerprints were found on adding machine tapes, drug ledgers, and on a box containing currency. He had direct contact with Inocencio and Garza, he received two firearms from Inocencio, and cocaine residue was found on the adding machine tapes and ledgers.

"Under the Sentencing Guidelines, a defendant who participates in a drug conspiracy is accountable for the quantity of drugs[,] which is attributable to the conspiracy and reasonably foreseeable to him." United States v. Mitchell, 31 F.3d 271, 277 (5th Cir. 1994); see also U.S.S.G. §1B1.3(a)(1)(B). The district court adopted the presentence report which specifically set out Garcia's involvement in this conspiracy. Based on the evidence presented, the district court did not err in attributing more than 150 kilograms of cocaine to Garcia for sentencing purposes.

CONCLUSION

For the foregoing reasons, we **REVERSE** the convictions of Garza and Garcia as to the money laundering count of the indictment and **REMAND** for appropriate resentencing. We **AFFIRM** the remaining convictions and sentences for Inocencio, Oziel, Garza, and Garcia.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-21094

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JORGE ALBERTO INNOCENCIO;
HOMERO HINOJOSA GARCIA;
Defendants-Appellants

Appeals from the
United States District Court for the
Southern District of Texas, Houston

ON PETITIONS FOR REHEARING

Before POLITZ, Chief Judge, DEMOSS, Circuit Judge, and DOHERTY,* District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-21094

U.S. COURT OF APPEALS
FILED
AUG 13 1997
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JORGE INNOCENCIO; HOMERO HINOJOSA GARCIA;

Defendants - Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITIONS FOR REHEARING

Before POLITZ, Chief Judge, DEMOSS, Circuit Judge, and DOHERTY,* District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation.

REHG-13

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

SENT BY:CLERK'S OFF NOLA :11-19-97 : 11:57 : USCA 5th CIRCUIT- ATTORNEY:# 1/ 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-21094

D.C. Docket No. CR-H-95-36-1

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JORGE INNOCENCIO;

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston.

Before POLITZ, Chief Judge, DeMOSS, Circuit Judge, and DOHERTY*, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the sentence and conviction of the District Court in this cause are affirmed.

ISSUED AS MANDATE: Aug 22 1997

*District Judge of the Western District of Louisiana, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

V.

JORGE ALBERTO INOCENCIO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 4:95CR00036-001

Eustorgio Perez
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s)_____

[ ] pleaded nolo contendere to count(s)_____ which was accepted by the court.

[x] was found guilty on count(s) 1,2 and 4 on August 17, 1995 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21 U.S.C. § 846	Conspiracy to poss. w/intent to distribute 5 kilograms of cocaine	01/26/1995	1
18 U.S.C. § 2	Aid. & abetting to poss. w/intent to distrib. 5 kilograms of cocaine	01/26/1995	2
18 U.S.C. § 1956(a)(1)(A)	Money Laundering	01/26/1995	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)_____

[ ] Count(s)_____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 461-43-5251

Defendant's Date of Birth: 04/21/1959

Defendant's USM No.: 12866-079

Defendant's Residence Address:
5816 Mavis Lane
Pasadena TX 77505

Defendant's Mailing Address:
5816 Mavis Lane
Pasadena TX 77505

12/15/1995
Date of Imposition of Judgment

/s/ David Hittner
Signature of Judicial Officer

DAVID HITTNER
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

1/2/96
Date

DEFENDANT: **JORGE ALBERTO INOCENCIO**
CASE NUMBER: **4:95CR00036-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

As to Counts 1 and 2, defendant sentenced to FIVE (5) years supervised release and as to Court 4, a supervised release term of THREE (3) YEARS, all terms to run concurrent to each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision-Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to periodic urine surveillance and/or breath, saliva and skin tests for the detection of drug abuse as directed by the probation officer. The defendant will incur costs associated with such detection efforts based on ability to pay as determined by the probation officer.

DEFENDANT: **JORGE ALBERTO INOCENCIO**
CASE NUMBER: **4:95CR00036-001**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 150.00**	**$**	**$**

[ ] If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____0.00.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: JORGE ALBERTO INOCENCIO
CASE NUMBER: 4:95CR00036-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: JORGE ALBERTO INOCENCIO
CASE NUMBER: 4:95CR00036-001

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 40
Criminal History Category: I
Imprisonment Range: 292 to 365 months
Supervised Release Range: 5 to 5 years
Fine Range: $ 25,000.00 to $ 8,000,000.00

[x] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic

circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[x] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

Excessive amount of cocaine (1,555.5 kilograms, money (over $14 million in drug proceeds) and the defendant's role in the instant offense.

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following specific reason(s):

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
V.	§	**CRIM. NO. H-95-36**
JORGE INOCENCIO ET AL.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 21 and 25, 1995, the Court heard the motions to suppress filed by the five defendants in this matter. Based on the evidence adduced at that hearing, the submissions of counsel, and the applicable law, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On January 26, 1995, law enforcement personnel established surveillance on Homero Hinojosa Garcia ("Garcia") at the Days Inn, 8611 Airport Blvd., Houston, Texas. Surveillance was established based on information received from a confidential source that Garcia and another individual, Pedro Elizondo Garza ("Garza") were involved in narcotics trafficking and narcotics money laundering.

2. In the course of the surveillance, Houston Police Department ("HPD") Officer Jerry Nimmo observed a red Buick Regal ("Regal") parked in the Days Inn parking lot. Nimmo observed a Latin male, later identified as Garcia, seated in the passenger seat of the Regal. Nimmo observed that Garcia was looking around as if attempting to identify law enforcement surveillance.

3. Nimmo then saw another Latin male, later identified as Garza, enter the Regal and drive off. Law enforcement officers followed the Regal. It exited the parking lot and drove north on Monroe past Dillon and then u-turned back to Dillon, proceeding west to a nearby neighborhood. The car then stopped in front of 8634 Dillon at approximately 10:55 a.m. Garcia exited the car and looked up and down the street as if looking for law enforcement surveillance. At approximately 10:57 a.m., the Regal drove off. HPD Officer John Pineda observed that Garcia was now seated in the back seat of the Regal. The Regal returned to the Days Inn and parked in the same spot as it had previously been parked. Garza exited the vehicle and entered the Days Inn while Garcia waited in the rear seat.

4. At 11:08 a.m., Garza exited the Days Inn carrying a tan soft sided sports bag. Garcia was accompanied by a Latin male, later identified as David Tovar. Garza and Tovar walked toward the Regal and appeared to have a conversation. About half way to the Regal, Tovar turned and walked to a black Chevrolet Camaro ("Camaro"), bearing Texas license plate DWG-29H, which was parked in the South lot at the Days Inn. Garza continued on to the Regal and placed the tan sports bag in the driver's side rear floor board of the Regal. Officer Nimmo then observed Garza drive to the South parking lot of the Days Inn where he parked beside the Camaro. Officer Nimmo then observed that Tovar, Garza, and Garcia were standing behind the Camaro and appeared to be having a conversation. Tovar then got into the Camaro and Garza and Garcia both got into the Regal. At approximately 11:12 a.m., these vehicles departed in tandem.

5. The Camaro followed the Regal at about a two block distance to the 8700 block of Broadway. Sgt. Pohlman observed that the Regal made a "heat run" by driving about two turnarounds past 8750 Broadway and then u-turning back to the apartment complex located at 8750 Broadway, Houston, Texas. The Camaro continued on toward Interstate

45 and surveillance of the Camaro was discontinued. At 11:17 a.m., the Regal pulled up to the security gate at the apartment complex at 8750 Broadway where the driver punched in a gate code number and entered the complex.

6. HPD Officer Ted Bell observed that the Regal parked in front of apartment no. 2142. Garza was seated in the driver's seat of the Regal. The door to apartment number 2142 was standing open.

7. A law enforcement inquiry with HL&P revealed that the subscriber for utilities for apartment no. 2142, 8750 Broadway was David Tovar. Further, it was subsequently determined that Tovar was the lessee of apartment no. 2142.

8. At 11:23 a.m., Officer Bell observed that an unknown person appeared to enter the passenger side of the Regal. The Regal then departed from the area.

9. The Regal was followed to J.D. Sales, 906 Spencer Highway, Pasadena, Texas, arriving at approximately 11:30 a.m. Enroute, the Regal made a "heat run". This "heat run" consisted of driving past J.D. Sales twice and making u-turns to return to the location. Further, it was noted that the Regal was not following the flow of traffic enroute to J.D. Sales. Rather, it was being driven very slowly. At J.D. Sales, an unidentified Latin male came out of J.D. Sales and talked to the occupants of the Regal. Garza and Garcia then exited the vehicle and the three went inside J.D. Sales.

10. At 11:40 a.m., Garza and Garcia exited J.D. Sales, entered the Regal and departed.

11. The surveillance team followed the Regal to the point where it turned onto Mavis Lane, Pasadena, Texas. Upon Officer Nimmo's arrival at Mavis Lane, the Regal had disappeared. Believing that the Regal had entered a garage on Mavis Lane, Nimmo and the rest of the surveillance team set up a perimeter around the neighborhood.

12. At approximately 2:55 p.m., Garcia, now a passenger in a blue Chrysler New Yorker ("New Yorker"), arrived at a Texaco station on Spencer Highway, located on the perimeter of the Mavis Lane neighborhood. Garza utilized a pay phone at this Texaco station. Law enforcement inquires determined that the registered owner of the New Yorker was "Dollar Rent a Car" and that a Juan Solis was the renter of the vehicle.

13. At 2:58 p.m., a black Mercury Marquis ("Marquis") subsequently arrived at the Texaco station and parked beside the New Yorker. Further, a Latin male, later identified as Jorge Alberto Inocencio ("Inocencio") exited the Marquis and appeared to pass a package to Garcia. Officer Dyches observed Inocencio leaning in the passenger side front window of the New Yorker where Garcia was seated. Further, Garcia was looking at an object believed to be a green bag. After this meeting, Inocencio got back in the Marquis and departed while Garza and Garcia departed in the opposite direction. The surveillance team split to follow both vehicles.

14. HPD Officer Dan Fern followed Inocencio in the Marquis to 5816 Mavis Lane.

15. At approximately 3:05 p.m., Special Agent Hughes observed the New Yorker stop at a Conoco station located at the corner of Spencer Highway and Preston. At this Conoco station, Garza was pulled up to a pay phone and, without exiting the vehicle, make a pager type call, meaning that Garza picked up the telephone, dialed a number, hung up and waited, as if waiting on a return call pursuant to a page. Garza did not pick up the phone again. At 3:10 p.m. the New Yorker departed the Conoco station.

16. At 3:20 p.m. law enforcement officers stopped Garza and Garcia in the New Yorker in the 3800 block of Spencer Highway, Pasadena, Texas. The New Yorker was stopped because Special Agent Hughes believed that the occupants of

the vehicle had just engaged in a narcotics transaction at the Texaco station.

17. Upon stopping the vehicle, officers approached the vehicle and observed a pistol on the front seat of the New Yorker. Garza and Garcia were then ordered to put their hands up and exited the vehicle. HPD Officer Ted Bell testified that he determined that both Garza and Garcia spoke Spanish and advised both that the officers were conducting an investigation and that he wished to speak to them. Officer Bell suggested that they move out of traffic and into a parking lot across the street. Garza and Garcia agreed and accompanied Officer Bell to the parking lot. In view of the fact that one pistol had been found in the vehicle, Officer Nimmo moved the New Yorker from the street to the parking lot where Bell was speaking to Garza and Garcia.

18. Officer Bell obtained identification from Garza and Garcia. Both Garza and Garcia denied any knowledge of the pistol which had been found in plain sight on the front seat of the New Yorker. Officer Bell determined that Garza had borrowed the New Yorker. He then explained to Garza and Garcia that the officers were conducting a narcotics investigation and that he would like their permission to search the New Yorker. Garza verbally consented to the search of the vehicle. Bell then explained to Garza that he did not have to allow officers to conduct the search of the vehicle. Further, that he had the right to demand that the officers obtain a search warrant before searching the vehicle. After this explanation, at approximately 3:25 p.m. Garza read and signed a written consent to search form covering the New Yorker

19. A search of the vehicle resulted in the discovery and seizure of another semi-automatic pistol. This pistol was found in the pocket of a green jacket on the passenger side floor board of the vehicle. Officer Bell then asked Garza and Garcia about the second pistol. Both Garza and Garcia

denied any knowledge of either pistol. Both pistols were loaded.

20. Garza told Officer Bell that he and Garcia were staying at a local hotel. He did not tell Officer Bell that he was staying at the Mavis Lane residence.

21. Officer Bell explained to Garza and Garcia that the officers intended to continue the investigation and would like for them to accompany the officers to 5816 Mavis Lane. Garza rode in Sgt. Pohlman's vehicle. For purposes of officer's safety during the three mile drive from the traffic stop location to the Mavis residence,[1] Garza was hand cuffed while he was inside Sgt. Pohlman's vehicle. Shortly after arriving at 5816 Mavis Lane, Garza's hand cuffs were removed. Garcia drove the New Yorker by himself to 5816 Mavis Lane.

22. At approximately, 3:40 p.m., while Garza and Garcia were talking to Officer Bell, Inocencio exited 5816 Mavis Lane, and attempted to depart the residence in the Marquis. HPD Officer Fern stopped Inocencio, identified himself and asked if Inocencio spoke English. Inocencio stated that he only spoke a little English. Fern, knowing that weapons had been found when Garza and Garcia were stopped, conducted a "pat down" of Inocencio. Officers did not display weapons at the time Inocencio was stopped. Fern requested and received identification from Inocencio. Officer Fern also explained that they were conducting an investigation and that a Spanish speaking officer would be there in a few minutes. Inocencio and Officer Fern waited for approximately five minutes in the front yard of 5816 Mavis Lane, for the arrival of Officer Ted Bell. Inocencio's wife, Celia, and their

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[1] All the law enforcement personnel at the traffic stop were in separate vehicles. Hence, Sgt. Pohlman had to be alone when he transported Garza to the Mavis residence.

children were in the front yard at the time of Officer Fern's arrival at 5816 Mavis.

23. Upon Officer Bell's arrival at 5816 Mavis Lane, Officer Fern handed Inocencio's Texas drivers license to Bell. Officer Bell then spoke to Inocencio and explained that the officers were conducting an investigation into narcotics trafficking and wanted to ask him some questions regarding this matter. Bell asked Inocencio if they could go inside Inocencio's residence to talk and Inocencio consented. Bell and Sgt. Pohlman accompanied Inocencio into the residence where they sat down at the dining table. Inocencio stated that he and his family were living in the residence at 5816 Mavis Lane. Further, he indicated that Garza and Garcia had been staying at the house for approximately one or two days, but did not specify where in the house Garza and Garcia had been staying. Inocencio also stated that he was buying the house located at 5816 Mavis Lane. Inocencio then verbally consented to the search of 5816 Mavis Lane, Pasadena, Texas. Officer Bell explained to Inocencio that he did not have to cooperate with the police officers and that he had the right to require that the police officers obtain a search warrant to search hie (sic) residence. Officer Bell advised Inocencio that his decision to cooperate was totally voluntary and that the police did not wish to intimidate him in any way. Further, that he had the right to refuse the request to search his residence if he wanted to. After this explanation, at 3:52 p.m. Inocencio read and signed a written consent to search his residence located at 5816 Mavis Lane, Pasadena, Texas.

24. The Spanish language version of the written waiver form signed by Inocencio translates the English word "premises" into the Spanish word "premisas." In Spanish, this word means premise in the sense of logical proposition. It does not have the meaning of residence or location.

25. The residence was searched, and the results of the search were as follows:

a. Approximately 104 kilogram size packages of a white powdery substance was seized. A sample of the substance field tested positive as cocaine. Approximately 102 of these packages were found in a portion of the attic located above the garage. The packages bore 'joker cards' and 'red ace of club cards' as labels. Two of these packages were found in a portion of the attic which is adjacent to an upstairs bedroom. This portion of the attic can be accessed by a door located on the south wall of the bedroom so that this portion of the attic space can be entered as if entering another room.

b. U.S. currency totaling $5,084,745 was seized. Evidence found at the scene indicated that this U.S. currency had been counted and packaged at 5816 Mavis Lane. This evidence included an adding machine and adding machine tapes, rubber bands and new and empty rolls of tape. This same type tape had been used on some of the boxes that contained the U.S. currency. Further, this same type tape had been used to wrap some of the individual bundles of U.S. currency. Most of the U.S. currency was found in an upstairs bedroom.

c. Drug records evidencing the distribution of cocaine and the receipt of payments on account were seized.

d. One loaded semi-automatic pistol and two loaded revolvers were seized. The semi-automatic pistol and one of the revolvers were found in the upstairs bedroom with the U.S. currency. The second revolver was found between the mattress and box springs in the downstairs master bedroom.

e. One pistol box with the serial number TYR 3688 was seized. This serial number matched the serial

number on the pistol found on the seat of the New Yorker.

f. One mobile telephone was seized. This mobile telephone was found in the bedroom with the currency and the drug records.

26. Despite Inocencio's prior assertion that Garza and Garcia were house guests, during the course of the search the two said nothing and never stated that they were staying there but rather than staying at a local hotel.

27. After he was formally arrested and given his Miranda warnings, Garza told Officer Bell that he had a day room at the Le Fronda Hotel, although he did not have a room at that establishment at the time. He stated that he knew the Mavis residence was where "Jorge" lived, but that he did not know "Jorge's" last name and that he had only known Jorge for about a week.

28. While the New Yorker was being surveilled, surveillance was also in place on the apartment at 8750 Broadway.

29. At approximately 1:00 p.m., Officer Pineda observed that three Latin males appeared to exit apartment no. 2142, 8750 Broadway, Houston, Texas. These three Latin males were later identified as Tovar, Jesus Luis Flores ("Flores"), and Oziel Pedro Alanis ("Alanis"). The three entered a Lincoln Towncar ("Towncar") bearing Texas license plate PRZ-82G and departed. Law enforcement officers followed the Towncar. The Towncar drove to a Hi/Lo Auto Parts store located at the intersection of W. Bellfort and Fondren where Flores and Alanis exited the vehicle. Tovar then drove a short distance down W. Bellfort to the "House of Colors" paint and body shop where Tovar exited the vehicle and entered the body shop office. After a few minutes, Tovar exited the body shop office and departed in the Towncar.

30. Just before 3:50 p.m., Tovar, Flores and Alanis returned to 8750 Broadway where they entered apartment no. 2142.

31. At 3:53 p.m. Tovar, Flores and Alanis exited apartment no. 2142, entered the Towncar and departed. Surveillance units followed.

32. Officer Pineda was instructed by his superior, HPD Officer R. Fisher, to stop the Towncar because things were developing over at the Mavis location. Based on the work he has undertaken with Fisher on many prior occasions, Pineda interpreted Fisher's statement to mean that drugs or drug proceeds had been recovered.

33. Fisher was told that the U.S. Currency had been found within approximately three minutes after Inocencio agreed to the search (i.e., at approximately 3:55 p.m.).

34. At approximately 4:00 p.m., an HPD patrol car stopped the Towncar in the 3800 block of Broadway, pursuant to Officer Pineda's request. Tovar was the driver, Flores was seated in the passenger side front seat and Alanis was seated in the rear seat. Officer Pineda approached the vehicle and asked Tovar to step out of the car. Officer Pineda asked Tovar if he spoke English or Spanish and Tovar replied that he spoke both languages.

35. Pineda inquired as to who was the owner of the Towncar and who was the lessee and occupant of apartment no. 2142, 8750 Broadway. Tovar stated that he was the owner of the Towncar and that he was the lessee and occupant of the apartment in question. Pineda explained to Tovar that the officers were conducting a narcotics investigation. Further, he explained that the officers wanted his permission to search his vehicle and his apartment. Pineda explained to Tovar that he had the right to refuse to allow the search of his vehicle and apartment. Pineda asked Tovar if he had any contraband in the car. Tovar replied "no."

36. Officer Pineda asked Tovar for consent to search the Towncar. Tovar told Pineda that he should go talk to INS Agent Gus San Miguel. Agent San Miguel then explained to Pineda that Tovar had told him that he was a confidential informant, working for the federal government. Further, Tovar stated that he was working on a large deal and provided the officers with his alleged control agent's telephone number. Tovar also stated that if the investigation was continued, the agents would probably get a small amount of cocaine but would mess up the big deal that he was working on.

38. Special Agent Suzie Wong, IRS-CID, in attempting to verify Tovar's story, determined that at one time, Tovar had been a confidential informant for the United States Customs Service. However, Tovar had not served as a confidential informant for a number of years.

39. It began to rain. Therefore, San Miguel, Pineda and Tovar sat in the patrol car to talk. Pineda explained that they were attempting to verify his story. Tovar claimed that there was no contraband in the Towncar. Pineda again asked Tovar for consent to search the Towncar. Tovar verbally consented to the search of the Towncar. Pineda testified that he again explained to Tovar that he had a right to refuse to allow the search and that it was his decision whether to permit the search. Tovar stated that he understood. Officer Pineda then asked Tovar if he could read and write English and Spanish. Tovar stated that he could read and write both languages. Pineda prepared a written consent to search form for the Towncar. Tovar read and signed this consent at 4:25 p.m.

40. Pineda then inquired as to whether Tovar would consent to the search of his apartment. Tovar verbally consented. Pineda then filled out a consent to search form for apartment no. 2142, 8750 Broadway, Houston, Texas. Tovar read and signed this consent at 4:27 p.m.

41. As a result of the search of the Towncar, the following items were seized:

a. One kilogram size package of cocaine. This cocaine was found under the passenger side front seat of the vehicle and was contained in a potato chip bag. The mouth of the bag was open so that the kilo contained inside could be seen. This kilogram of cocaine bore a 'red ace of clubs card' as a label.

b. $2,285.00 in U.S. currency. This U.S. currency was found in the glove box of the Towncar.

c. One mobile telephone. This phone was found on the driver's seat of the Lincoln.

42. As a result of the search of apartment 2142 located at 8750 Broadway, Houston, Texas, the following evidence was seized:

a. Six kilogram size packages of a white powdery substance believed to be cocaine. These packages were found in a bedroom closet located on the west side of the apartment. These packages were found inside two boxes. These packages bore a 'red ace of clubs card' as a label.

b. One loaded semi-automatic pistol and one loaded revolver. These firearms were also found in the bedroom located on the West side of the apartment. Both of these pistols were subsequently determined to be stolen.

c. Two assembled silencers and numerous silencer parts. These silencers and parts were found in a hall closet which butts up to a bedroom located on the east side of the apartment.

d. Additionally, a lathe was found but not seized. The police believe it to have been used to manufacture the silencers and parts.

43. After the discovery of cocaine in the Towncar, Tovar was advised that he was under arrest and advised of his constitutional rights. He then made the following statements:

a. Tovar indicated that Alanis and Flores brought the cocaine to his apartment.

b. Flores had arrived at his apartment on Thursday, January 26, 1995.

44. Based on the foregoing, it is evident that the agents had reasonable suspicion to stop Garza and Garcia. They also had probable cause to search the vehicle when they saw the weapon on the front seat, and in any event, Garza consented to a search of the vehicle. In addition, the officers had reasonable suspicion to stop Inocencio, in light of the fact that he had apparently transferred to Garza and Garcia a firearm at a clandestine meeting at the Texaco. Further, Inocencio consented, verbally and in writing, to the search of the Mavis residence. It is also evident that the agents had reasonable suspicion to stop the Towncar which Tovar was driving in light of Tovar's actions when he met with Garza and Garcia during the late morning hours of January 26th. In any event, the agents had Tovar's oral and verbal consent to search this vehicle and his apartment. Finally, the voluntary consent granted by Garza, Inocencio and Tovar vitiated any complaint they might have that their fourth amendment rights had been violated.

CONCLUSIONS OF LAW

1. The defendant in a suppression hearing bears the burden of establishing standing. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); United States v. Pierce, 959 F.2d 1297, 1303 (5th Cir.), cert. denied, 113 S.Ct. 621 (1992). Standing is a

privacy or property interest in the area searched or the items seized which is sufficient to justify a "reasonable expectation of privacy" therein. United States v. Judd, 889 F.2d 1410, 1413 (5th Cir. 1989), cert. denied, 494 U.S. 1036 (1990) (citation omitted).

2. The fourth amendment only protects the expectations of privacy "that society is prepared to recognize as 'reasonable'". United States v. Boruff, 909 F.2d 111, 115 (5th Cir. 1990) (quoting Katz v. United States, 389 U.S. 347, 361 (1967)), cert. denied, 499 U.S. 975 (1991).

3. One cannot manifest a reasonable expectation of privacy in an item once it has been abandoned. United States v. Barlow, 17 F.3d 85, 88 (5th Cir.), cert. denied, 115 S.Ct. 148 (1994); United States v. Quiroz-Hernandez, 48 F.3d 858, 864 (5th Cir. 1995) (it is settled law in this circuit that an individual has no standing to complain of a search or seizure of property that he voluntarily abandoned). As noted by the Quiroz-Hernandez Court,

> The test for determining when an object has been abandoned is one of intent, which "may be inferred from words spoken, acts done, and other objective facts." The accused need not have abandoned the searched item in the strict property sense, where an intent to relinquish ownership must be shown; merely an intent to voluntarily relinquish his privacy interest is sufficient.

Id.

4. Garza and Garcia have not shown that they possess a subjective expectation of privacy in the Mavis property. It was not until after charges were brought that Garza and Garcia for the first time took the position that they were indeed staying in the room where in excess of five million dollars was found.

5. Although Inocencio made a statement that Garza and Garcia had been staying at some location in the Mavis residence for one or two days, that statement contradicts the position which Garza and Garcia took at the time they had been stopped. Accordingly, in light of Garcia's and Garza's misrepresentations, the Court concludes that their claim to a privacy interest in the Mavis residence is not objectively reasonable. Therefore, the Court finds that Garza and Garcia lack standing to challenge the search of the residence at 5816 Mavis, Pasadena, Texas.

6. In addition, Garza and Garcia denied any legitimate possessory interest in the Mavis residence when they were questioned by Officer Bell, because they told Officer Bell that they were staying at a local hotel. This denial amounts to an abandonment of any possessory interest they may have had in the Mavis Lane residence. See e.g., Quiroz-Hernandez, 48 F.3d at 864; United States v. Thomas, 12 F.3d 1350, 1367 (5th Cir.), cert. denied, 114 S.Ct. 1861 and 114 S.Ct. 2119 (1994); United States v. Piaget, 915 F.2d 138, 140 (5th Cir. 1990).

7. Alanis lacks standing to challenge the search of Tovar's apartment on Broadway. He asserted no interest in the apartment prior to the time it was searched, and no evidence was brought forward at the suppression hearing to show that he had a privacy interest in Tovar's apartment. The mere fact that a box containing cocaine, from which the police lifted Alanis' fingerprints, was found in the apartment is insufficient evidence in itself to establish standing. Accordingly, Alanis lacks standing to challenge the search of Tovar's apartment at 8750 Broadway, No. 8142 (sic), Houston, Texas.

8. Reasonable suspicion is defined as "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). To establish the reasonable suspicion necessary to justify the

stop and frisk of an individual for fourth amendment purposes, "some quantum of individualized suspicion" of the particular individual detained is required. United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976). The primary bases for reasonable suspicion are a police officer's personal observations or the collective knowledge of several law enforcement personnel. See United States v. Hanson, 801 F.2d 757, 763 (5th Cir. 1986). When considered together, several innocent activities may "amount to reasonable suspicion." United States v. Sokolow, 490 U.S. 1, 9 (1989).

9. The courts afford considerable deference to the observations and conclusions of trained officers, reasoning that through their experience and expertise they can infer criminal activity from conduct that seems innocuous to an untrained observer. See United States v. Gonzalez, 842 F.2d 748, 753-54 (5th Cir. 1988); United States v. Tarango-Hinojosa, 791 F.2d 1174, 1175-76 (5th Cir. 1986).

10. The officers had reasonable suspicion to stop the Chrysler New Yorker, in light of the following: 1) Garcia and Garza had just picked up a package under extremely suspicious circumstances; 2) this package was dropped off just minutes after Garza and Garcia swapped cars, and Garza placed a pager call from a public telephone at the Texaco; 3) Garza and Garcia were traveling in a rental car, which is a common technique employed by drug traffickers; 4) immediately after receiving the package, Garcia placed a call from a different public phone at the Conoco, a typical maneuver for persons who had just participated in a narcotics transaction; 5) Garza and Garcia had previously on January 26, 1995, been observed in three separate "heat runs", that is, driving which, based on the agents training and experience indicated that they were trying to determine whether they were being followed by law enforcement.

11. The agents who were working the case have extensive experience and training in the observation of narcotics trafficking activity. Hence, their impressions of the

defendants' activities carry far greater weight than that which a lay person would observe. See Sokolow, 490 U.S. at 9.

12. Similarly, the agents were justified in stopping Inocencio as he was leaving the Mavis residence in the Mercury Marquis. They had just seen Inocencio pass a package to Garcia and Garza, and had concluded that the package in question contained a firearm. Garza and Garcia became evasive when asked questions about the firearm and the person who gave them the weapon, Inocencio. Given the clandestine nature in which this meeting took place at the Texaco station, when combined with Garza's and Garcia's prior suspicious actions and their evasive answers to questions concerning the weapons and Inocencio, the officers were justified in stopping Inocencio and asking him questions about what had taken place. At no time did the officers exert undue coercion in speaking to Inocencio, that is, they never brandished weapons or placed him in cuffs or subjected him to threats or prolonged or hostile questioning.

13. Similarly, the agents were justified in stopping Tovar in the Lincoln Towncar. They knew that Tovar had met earlier in the day with Garcia and Garza under suspicious circumstances. Having later found out that Garcia and Garza were connected to a residence on Mavis which had over $5 million dollars in illicit proceeds, they felt compelled to stop Tovar to further their investigation.

14. The Terry stops involving Inocencio, Tovar and Alanis were minimally intrusive. See United States v. Place, 462 U.S. 696, 706 (1983). During Inocencio's stop, he was allowed to sit at his leisure at his dining room table. Alanis was allowed to sit inside his vehicle with Flores. Tovar was, for a time, left standing by himself unattended by law enforcement officers on the side of the road during the course of the stop.

15. In certain situations, law enforcement officers may seize evidence that is in plain view, despite the failure to obtain a

warrant for the seizure. Coolidge v. New Hampshire, 403 U.S. 443 (1971). An essential predicate to such a seizure is a showing that "the officer did not violate the Fourth Amendment in arriving at the place where the evidence could be plainly viewed. Horton v. California, 496 U.S. 128, 136-37 (1990). In addition, the incriminating character of the evidence must be immediately apparent and the officer must have a lawful right of access to the object itself. Id.

16. While the plain view doctrine does not justify a warrantless entry to the location of the observed object, even if an officer viewed the object from a place where he could lawfully be, a warrantless entry to seize such an object may be justified by exigent circumstances. Id.

17. In Arizona v. Hicks, 480 U.S. 321 (1987), the Court held that to establish the incriminating character of an item, the police must show that, after inspection of "what is already exposed to view," they are able to determine that it is evidence or contraband. Id. at 328.

18. The officers were justified in seizing the guns from the New Yorker based on the plain view doctrine.

19. The Fourth Amendment does not require that police officers obtain a warrant to search a motor vehicle when they have probable cause to believe that it contains contraband or evidence of criminal activity. Arkansas v. Sanders, 442 U.S. 753, 760 (1979); Chambers v. Maroney, 399 U.S. 42, 44, 52 (1970). Two separate rationale underlie the "automobile exception" to the warrant requirement.

20. The officers had probable cause to believe that the New Yorker contained evidence of criminal activity. They had just observed Garza and Garcia engaged in suspicious driving and telephonic activities, leading up to the clandestine meeting at the Texaco station, during which time Garza and Garcia received a mysterious package from Inocencio. Moreover, at the time of the stop, the agents and officers

noticed that a pistol was in plain view on the front seat of the vehicle.

21. Given the inherent mobility of the automobile, and the fact that persons possessing an interest in the vehicle have a reduced expectation of privacy in same since vehicles are highly regulated by governmental authorities, the facts in this case fall under the automobile exception to the warrant requirement.

22. A search based upon the consent of an individual may be undertaken by government agents without a warrant or probable cause, and any evidence discovered during the search may be seized and admitted at trial. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Consent, which may be express or implied, is the voluntary waiver of Fourth Amendment rights. Id. at 235.[2] To determine whether consent was voluntarily given, courts examine the totality of the circumstances surrounding the consent. Bustamonte, 412 U.S. at 227; United States v. Mendenhall, 446 U.S. 544, 557-60 (1980). The prosecution bears the burden of proving that consent was not the product of coercion. Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion); Bustamonte, 412 U.S. at 222; Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968).

23. The factors used to determine whether consent is voluntary include: (1) the individual's knowledge of his

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[2] The waiver does not, however, have to be knowing and intelligent. Bustamonte, 412 U.S. at 241. Unlike waiver of a criminal defendant's rights associated with preserving a fair trial, the Bustamonte Court held that consent to an unreasonable search or seizure may be given unintentionally and without knowledge of the right to refuse consent. See Tukes v. Dugger, 911 F.2d 508, 517-518 (11th Cir. 1990) (fact that defendant had low level of education and intelligence did not void consent), cert. denied, 112 S.Ct. 273 (1991).

constitutional right to refuse consent; (2) his age, intelligence and education; (3) the degree to which the defendant cooperated with the law enforcement officers; (4) the length of time in which the defendant was detained and the nature of the questioning; (5) the use of physical punishment; and (6) whether there was other coercive police behavior present. United States v. Olivier-Becerril, 861 F.2d 424, 426 (5th Cir. 1988). While the foregoing factors are relevant, no single one is dispositive or controlling.

24. In this case, Inocencio cooperated with the authorities after he was stopped. He was told that he did not have to consent to the search of the house, and that he could require the government to obtain a search warrant. Nonetheless, he signed a written consent to search the Mavis residence.

25. Similarly, Tovar cooperated after the Towncar he was driving was stopped. He was informed that he had the right to refuse to consent to the search. Nonetheless, he told the officers a wild tale about being a government informant working in an undercover capacity, and he then agreed to said search and signed a consent to search form covering the Towncar. A couple of minutes later, he also signed a consent to search his residence at 8750 Broadway, no. 2142, after having been advised he had a right to refuse to consent.

26. A warrantless search is valid when law enforcement personnel rely upon on a person's apparent authority to consent to the search if the reliance is in good faith and reasonably based on all the facts known by the police at the time of the search. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). United States v. Kinney, 953 F.2d 863, 866-67 (4th Cir.), cert. denied, 112 S.Ct. 2976 (1992); United States v. Yarbrough, 852 F.2d 1522, 1534 (9th Cir.), cert. denied, 488 U.S. 866 (1988).

27. The owner of property generally has the authority to consent to search all areas of that property, even areas

temporarily occupied by "invited guests." See e.g., United States v. Wright, 971 F.2d 176, 180 (8th Cir. 1992).

28. Inocencio appeared to the officers as having the necessary authority to consent to the search of the entire house as required by Illinois v. Rodriguez. The officers on the scene reasonably and in good faith believed that Inocencio had the authority to allow them to search the entirety of his residence at 5816 Mavis, including the upstairs bedroom where the $5 million dollars plus were seized, and the attics where over 100 kilograms of cocaine worth several million dollars were recovered.

29. "Voluntary consent can validate a search even when the consent to search is preceded by a Fourth Amendment violation." United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir. 1993) (citing United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978)).

30. Even if the officers violated Terry v. Ohio in stopping the defendants, their consents to search the vehicles and residences vitiated any fourth amendment violations arising out of the stop. First, the defendants were not in custody when the consents were given, that is, they had not been placed under formal arrest. Inocencio was sitting at his dining table at his home when he consented to the search of the Mavis residence. Garza and Tovar were in public locations, that is, on the sides of roads, when they consented to the search of the New Yorker and Lincoln, respectively. During this time, none of these persons were in cuffs or in a setting one would associate with a formal arrest. Second, no coercive police procedures were employed, such as threats or prolonged or hostile questioning. Third, the defendants appeared cooperative with the officers at the time. At no time did any defendant indicate that he did not wish to assist the officers in the investigation. Indeed, Tovar even volunteered to the officers a false story that he was working for other government agents in an undercover capacity at the time the Lincoln was stopped. Fourth, Inocencio, Garza and

Tovar were all aware of their right to refuse to consent to the searches. Officer Bell explained this right to Inocencio and Garza before accepting their consent to search the Mavis residence and the New Yorker automobile, respectively. Officer Pineda also explained to Tovar that he had the right to refuse to consent to the search of the Towncar and the Broadway Street apartment, prior to obtaining consent to search same. Fifth, each of the defendants responded to questions in a manner which suggested that they possessed the requisite degree of intelligence to understand that the officers were seeking permission to search, and that they had the right to withhold their consent.

31. Consent, which may be express or implied, is the free and voluntary waiver of fourth amendment rights. Bustamonte, 412 U.S. at 248.

32. Inocencio, Garza and Tovar consented in writing to the search of the Mavis residence, the Chrysler New Yorker automobile, the Lincoln Towncar and the apartment on Broadway, respectively. These written waivers stand as unusually strong proof of the validity of the waiver.

33. The fact that the Spanish translation of the consent form contained an incorrect translation of the word "premises" does not invalidate the consent given by Inocencio. Given that Inocencio testified that he never read the form, and given the statements made to him by Officer Bell, Inocencio's act of signing the document signifies to the Court that Inocencio intended to memorialize what the defendant had previously agreed to when he verbally consented to the search of the Mavis residence. As to Tovar, regardless of how one translates the Spanish version of the consent to search form, he likewise knew what he was signing as he can read and write both Spanish and English. Tovar read and signed both the Spanish and English consent forms in his Officer Pineda's presence.

34. Miranda warnings are required only when a suspect is both (1) in custody and (2) subjected to interrogation. Miranda v. Arizona, 384 U.S. 436, 477-78 (1966).

35. Tovar's statement, after he was stopped, that he was working with U.S. Customs as an informant on an undercover operation was made voluntarily to Special Agent Gus San Miguel with the INS. It was not made pursuant to any police questioning and it was made prior to the discovery of any contraband in the Lincoln Towncar or in Tovar's apartment at 8750 Broadway, no. 2142.

36. When the agents initially approached Tovar, they made it clear to them that they were conducting an investigation and that they simply wanted to ask them questions. He was not cuffed, and his freedom of movement was not unduly restricted. He was merely standing by the side of the road engaging the officers in conversation. At this point in time, Tovar was not in custody for Fifth Amendment purposes. Accordingly, the officers were at that time under no obligation to warn the defendant about his constitutional rights before they started engaging them in consensual conversations. See United States v. Bengivenga, 845 F.2d 593, 598 (5th Cir. 1988), cert. denied, 488 U.S. 924 (1989) (citing United States v. Brunson, 549 F.2d 348 (5th Cir.), cert. denied, 434 U.S. 842 (1977)).

37. A suspect may waive his Miranda rights. To prove a valid waiver, the government must show the following: (1) that the relinquishment of the defendant's rights was voluntary, and (2) that the defendant had a full awareness of the right being waived and the consequences of waiving that right. Moran v. Burbine, 475 U.S. 412, 421 (1986).

38. The statements made by Garcia and Garza to the police officers after they had been read their Miranda rights were voluntary and knowing. Consequently, the statements are admissible.

Based on the foregoing, the Court hereby

ORDERS that the motions to suppress (Documents nos. 24, 27, 36, 56, 62, 67, 78) are DENIED.

SIGNED at Houston, Texas, on this 13 day of July, 1995.

/s/ David Hittner
DAVID HITTNER
United States District Judge